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For participants only

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Seventieth session (second part)

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Held at the Palais des Nations, Geneva, on Thursday, 9 August 2018, at 3 p.m.

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Present:

Chair:	Mr. Valencia-Ospina
Members:	Mr. Argüello Gómez
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Hassouna
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Mr. Wako
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 3.05 p.m.

Draft report of the Commission on the work of its seventieth session (*continued*)

Chapter VIII. Peremptory norms of general international law (jus cogens) (*continued*) (A/CN.4/L.921)

The Chair invited the Commission to resume its consideration of chapter VIII of the report.

Paragraph 41 (continued)

The Chair, recalling that, at the previous meeting, Mr. Jalloh had indicated that he wished to propose various amendments to the paragraph, said that his proposal had since been circulated informally in writing. As amended by Mr. Jalloh, the paragraph would read:

> "Several members concurred with the position taken in draft conclusion 17 that binding obligations derived from resolutions of international organizations, including Security Council resolutions, should be invalid if they run counter to *jus cogens* norms. The view was expressed that the draft conclusions should address all resolutions of international organizations, including General Assembly resolutions concerning the maintenance of peace and security adopted in cases where the Security Council was unable to take a decision. It was also noted that other acts of international organizations, such as the regulations, directives and decisions taken by the European Union or acts by an intergovernmental conference, may also create legal obligations and should be addressed in the draft conclusions. Notwithstanding the remoteness of the possibility of a direct conflict between a Security Council resolution and a *jus cogens* norm, some members still considered it important to specify Security Council resolutions. They felt this to be necessary, given the unique status of such resolutions and their legal consequences for States in diverse fields of international law under Chapter VII of the Charter of the United Nations and the application of Article 103 of the Charter of the United Nations."

He took it that the Commission wished to adopt the paragraph as amended by Mr. Jalloh.

It was so decided.

Paragraph 41, as amended, was adopted.

Paragraph 42

Mr. Nolte proposed that, in order to strengthen the language used in the first sentence, the words "doubted the appropriateness of the specific reference to the resolutions of the Security Council" should be replaced with "did not consider that a specific reference to the resolutions of the Security Council would be appropriate".

Mr. Cissé proposed that the word "provision" in the last sentence should be replaced with "draft conclusion".

Sir Michael Wood said that he agreed with Mr. Cissé's proposal. While he could live with Mr. Nolte's proposal, he would have preferred to go even further by making explicit that other Commission members had opposed the specific reference to the resolutions of the Security Council. He proposed that, in the second sentence, the words "A concern" should be replaced with "Concern".

Mr. Jalloh said that, while he believed that the current text was fairly good, he was uncomfortable with some of the expressions that had been used, such as the words "potential negative impact" in the second sentence. He suggested that the word "negative" could be deleted from that particular expression.

The Chair said that it should be borne in mind that the paragraph under consideration was not part of the commentaries and did not reflect the Commission's considered position on the meaning of a particular draft conclusion. For that reason, the Commission could be a little more relaxed about the language used.

Sir Michael Wood said that he could remember references having been made in the debate to the "negative impact" of the specific reference to the resolutions of the Security Council. He could have taken issue with many of the phrases used in the previous paragraph, but he had not done so, as, unlike paragraph 42, it was not an assertion of his own position.

Paragraph 42, as amended, was adopted.

Paragraph 43

Paragraph 43 was adopted.

(ix) Draft conclusion 18

Paragraph 44

Mr. Ouazzani Chahdi said that, in the first sentence of the French text, the word "*de*" should be inserted after the words "*ne découlaient pas*".

Paragraph 44 was adopted, with that correction to the French text.

The Chair said that it would be helpful if proposals for corrections to the French text that had no bearing on the English text could be submitted directly to the Secretariat.

(x) Draft conclusion 19

Paragraph 45

Paragraph 45 was adopted.

(xi) Draft conclusion 20

Paragraphs 46 to 48

Paragraphs 46 to 48 were adopted.

(xii) Draft conclusion 21

Paragraph 49

Paragraph 49 was adopted.

Paragraph 50

Mr. Zagaynov said that, although he was grateful for the incorporation of his earlier proposal, the paragraph did not fully capture his intention. In order to ensure that it did, he proposed that the words "should not negatively affect acts related to the civilian population, such as the registration of births, deaths and marriages" should be replaced with "should not disadvantage the affected population and that relevant acts, such as the registration of births, deaths and marriages, ought to be recognized".

Paragraph 50, as amended, was adopted.

(xiii) Draft conclusion 22

Paragraph 51

Mr. Nolte said that the questions addressed in the paragraphs included under the heading "*Draft conclusion 22*" were relevant to paragraphs 22 and 23. For that reason, he proposed that the text of the current heading "*Draft conclusion 22*" should be replaced with "*Draft conclusions 22 and 23*" and that the later heading "*Draft conclusion 23*" should be deleted.

The Chair said he took it that the Commission wished to amend the heading "*Draft conclusion 22*" as proposed and to delete the heading "*Draft conclusion 23*".

It was so decided.

Paragraphs 51 to 56

Paragraphs 51 to 56 were adopted.

Paragraph 57

Mr. Nolte proposed that, for the sake of clarity, in the last sentence the words "for the Commission" should be inserted after "make it more difficult".

Paragraph 57, as amended, was adopted.

Paragraph 58

Paragraph 58 was adopted.

(xv) Future work

Paragraph 59

Mr. Nolte proposed that the words "and without giving States the opportunity to comment on a considered position of the Commission" should be inserted, after a comma, at the end of the first sentence so as to make explicit the reason for the regret expressed by some Commission members.

Paragraph 59, as amended, was adopted.

Paragraphs 60 to 62

Paragraphs 60 to 62 were adopted.

3. Concluding remarks of the Special Rapporteur

Paragraph 63

Paragraph 63 was adopted.

Paragraph 64

Mr. Nolte proposed that, in the fourth sentence, the words "general rule on interpretation" should be replaced with "general rule regarding interpretation" so as to avoid giving the impression of an allusion to the 1969 Vienna Convention on the Law of Treaties.

Paragraph 64, as amended, was adopted.

Paragraph 65 to 68

Paragraphs 65 to 68 were adopted.

Paragraph 69

Mr. Huang said that the Special Rapporteur's summary of the debate was to be commended for its clarity, detail and vigour. However, the last sentence, in particular, was not an appropriate conclusion to the paragraph. The key issue at stake was not the seriousness of a breach of *jus cogens*, but the extent to which the Commission's work on the topic should remain consistent with its articles on responsibility of States for internationally wrongful acts. He proposed that either the second half of the sentence, beginning with the words "by noting", should be deleted or the word "absurd" should be replaced with a more neutral one.

Mr. Tladi (Special Rapporteur) said that, although he had not used the word "absurd" in his summing-up of the debate, it had been included in the chapter under consideration to reflect the broader argument that he had made. The word was not intended as an insult. Indeed, he recalled that it was used in article 32 of the 1969 Vienna

Convention. In order to address Mr. Huang's concern, he proposed replacing the words "it would be absurd to suggest that it was lawful" with "it might create the impression that the Commission deemed it lawful".

Mr. Nolte said that he had assumed that the word "absurd" was a quotation from the Special Rapporteur. If it was not, he proposed that it should be replaced with "wrong".

Paragraph 69, as amended by Mr. Nolte, was adopted.

Paragraph 70

Paragraph 70 was adopted.

Paragraph 71

Mr. Tladi (Special Rapporteur) proposed that the first sentence should be replaced with two sentences that read:

"The Special Rapporteur conceded that draft conclusions 22 and 23 were different from other draft conclusions in that they concerned primary rules while the rest of the draft conclusions addressed methodological issues. He stated that this might provide a cogent reason for not including these draft conclusions."

Paragraph 71, as amended, was adopted.

Paragraphs 72 and 73

Paragraphs 72 and 73 were adopted.

The Chair invited the Commission to return to paragraph 2 of the same document, which had been left in abeyance at the previous meeting.

A. Introduction (continued)

Paragraph 2 (continued)

Mr. Tladi (Special Rapporteur) proposed that, on the basis of paragraph 57 of chapter VI of the Commission's 2015 report, two sentences should be added to paragraph 2 to read:

"Following the debates on those reports, the Commission decided to refer the draft conclusions contained in those reports to the Drafting Committee. The Commission heard interim reports from the Chairs of the Drafting Committee on peremptory norms of general international law (*jus cogens*) containing the draft conclusions provisionally adopted by the Drafting Committee at its sixty-eighth and the sixty-ninth sessions, respectively."

Paragraph 2, as amended, was adopted.

Chapter VIII of the draft report, as a whole, as amended, was adopted.

Chapter IX. Protection of the environment in relation to armed conflicts (A/CN.4/L.922 and A/CN.4/L.922/Add.1)

The Chair invited the Commission to consider chapter IX of the report, beginning with the portion of the chapter contained in document A/CN.4/L.922.

A. Introduction

Paragraphs 1 to 3

Paragraphs 1 to 3 were adopted.

B. Consideration of the topic at the present session

Paragraphs 4 to 8

Paragraphs 4 to 8 were adopted.

Paragraphs 9 and 10

Paragraphs 9 and 10 were adopted, subject to their completion by the Secretariat.

1. Introduction by the Special Rapporteur of her first report

Paragraphs 11 to 19

Paragraphs 11 to 19 were adopted.

2. Summary of the debate

(a) General comments

Paragraphs 20 to 30

Paragraphs 20 to 30 were adopted.

(b) Comments on draft principle 19

Paragraphs 31 to 35

Paragraphs 31 to 35 were adopted.

(c) Comments on draft principle 20

Paragraphs 36 to 40

Paragraphs 36 to 40 were adopted.

(d) Comments on draft principle 21

Paragraphs 41 and 42

Paragraphs 41 and 42 were adopted.

(e) Future work

Paragraphs 43 and 44

Paragraphs 43 and 44 were adopted.

3. Concluding remarks of the Special Rapporteur

Paragraphs 45 to 53

Paragraphs 45 to 53 were adopted.

The portion of chapter IX contained in document A/CN.4/L.922, *as a whole, was adopted.*

The Chair invited the Commission to consider the portion of chapter IX contained in document A/CN.4/L.922/Add.1.

C. Text of the draft principles on protection of the environment in relation to armed conflicts provisionally adopted so far by the Commission

2. Text of the draft principles and commentaries thereto provisionally adopted by the Commission at its seventieth session

Commentary to draft principle 4 (Measures to enhance the protection of the environment)

Paragraph (1)

Ms. Lehto (Special Rapporteur) proposed the deletion of the words "to this end" in the second sentence, as they did not seem to serve any purpose.

Sir Michael Wood said that, in order to track the draft principle exactly, the first sentence should be revised slightly so that it would read: "Draft principle 4 recognizes that States are required to take effective measures to enhance the protection of the environment in relation to armed conflict."

Paragraph (1), as amended, was adopted.

Paragraphs (2) to (5)

Paragraphs (2) to (5) were adopted.

Paragraph (6)

Mr. Rajput said that, although footnote 6 referred to paragraphs 164 to 173 of the 2016 commentary of the International Committee of the Red Cross (ICRC) on article 1 of the First Geneva Convention, the Committee indicated, in paragraph 120 of the commentary, that there was more than one possible interpretation of common article 1. That interpretation was also a matter of academic debate. Consequently, it might be improper for the Commission to take a certain position in paragraph (6).

Sir Michael Wood proposed that the first sentence should be redrafted to read: "Common article 1 requires that States, when they are in a position to do so, exert their influence to ensure respect for the Geneva Conventions." That would follow closely the wording of common article 1. He also proposed the deletion, in footnote 6, of the paragraph references, so that the footnote would refer to the whole of the ICRC commentary of 2016 on common article 1, which suggested a range of possible interpretations.

Ms. Lehto (Special Rapporteur), responding to Mr. Rajput, said that the most appropriate parts of the ICRC commentary of 2016 to reference would be paragraphs 155 and 156, where ICRC made clear that some States, in particular at the time of the adoption of the Conventions, interpreted common article 1 as referring only to ensuring respect for the Conventions within their own territory. The other interpretation advanced by ICRC was broader and included an external aspect, for instance, seeking to exert influence over the parties to an armed conflict to stop violations of international humanitarian law. That broader interpretation had found support in several judgments of the International Court of Justice and had also been endorsed by the Security Council of the United Nations and by the International Conference of the Red Cross and Red Crescent. She proposed that some references in line with her comments could be added to the footnote.

In response to Sir Michael Wood's comment, she said it was an ICRC view that common article 1 applied to all international humanitarian law obligations of States. It had been expressed in the ICRC study on customary international humanitarian law and that could also be made clear in the footnote. Other than the additions to the footnote, she would prefer to keep the text as it currently stood.

Sir Michael Wood, supported by **Mr. Rajput**, said that the first sentence was not the place for the Commission to take a position on the effect of common article 1 without having studied it carefully. The reformulation of that sentence to more closely follow the wording of common article 1 and the footnote reference to the 2016 ICRC commentary, indicating that there were different views about the modern interpretation of common article 1, would be sufficient in the current context.

Mr. Jalloh said that, to avoid opening up a major debate that the Commission might not have time to conclude at the current juncture, it would be best to accept the Special Rapporteur's proposal and to leave the first sentence as it currently stood.

Sir Michael Wood said that the problem was that the 2016 ICRC commentary was very controversial, precisely on the point in question, and he was not comfortable taking a position one way or the other.

Mr. Saboia said that he wished to express support for the Special Rapporteur's position.

Ms. Lehto (Special Rapporteur) said that it would be a pity to lose the reference to States' exerting their influence when they were in a position to do so; little value would be added if the Commission were to refer only to the exact language of common article 1. Since Sir Michael Wood's main objection appeared to be in relation to the reference to "international humanitarian law" as a whole, she would be prepared to replace it with the words "the Geneva Conventions". She further proposed the addition of text to the footnote indicating that there was also a broader interpretation that was advanced by ICRC.

Mr. Vázquez-Bermúdez said that he supported the compromise solution suggested by the Special Rapporteur.

The Chair invited the Secretary to read out the first sentence with the agreed amendments, including those to footnote 6.

Mr. Llewellyn (Secretary to the Commission) said that the first sentence would read: "Common article 1 is also interpreted to require that States, when they are in a position to do so, exert their influence to prevent and stop violations of the Geneva Conventions by parties to an armed conflict." The footnote would have the following sentence added to it: "The ICRC customary international law study provides a broader interpretation."

Ms. Lehto (Special Rapporteur) said that the Commission should perhaps also indicate that the study interpreted that obligation to apply to all humanitarian law obligations of a State, and that that was a view that was endorsed by ICRC. She would be happy to delete all references to specific paragraphs from footnote 6, as Sir Michael Wood had proposed.

Paragraph (6), as amended and with an amendment to footnote 6, was adopted

Paragraphs (7) and (8)

Paragraphs (7) and (8) were adopted

Paragraph (9)

Mr. Park said that that he wondered why there was no mention of nuclear weapons in the final sentence, where the reference to biological and chemical weapons appeared. He proposed that a reference should be made in that sentence to the Treaty on the Prohibition of Nuclear Weapons, which had been adopted in 2017. A footnote indicating that the treaty had not yet entered into force could also be added to the paragraph.

Sir Michael Wood said that Mr. Park's proposal was very controversial and he did not find it acceptable.

Mr. Zagaynov said that he totally agreed with Sir Michael Wood.

Mr. Rajput said that both previous speakers had made the same point that he had wished to make when he had asked for the floor.

Mr. Park said that the preamble of the Treaty on the Prohibition of Nuclear Weapons clearly referred to articles 35 and 55 of Additional Protocol I, which were directly linked to the topic under consideration.

Sir Michael Wood said that he thought that reservations or statements had been made in connection with those provisions that would be relevant.

Mr. Jalloh said that, in the context of the language of paragraph (9), the proposal made by Mr. Park seemed rather innocuous. He therefore wanted to express support in principle for Mr. Park's position. However, if members were not comfortable with the proposal to include a reference to nuclear weapons, the Commission could move on, in view of the practicalities of the situation.

Mr. Vázquez-Bermúdez said that he would support Mr. Park's proposal, but he saw that it was controversial and not acceptable to some colleagues. In any event, the words "such as" in the final sentence left room for the interpretation that other conventions were included.

Mr. Petrič said that he agreed with Mr. Vázquez-Bermúdez's comments regarding the words "such as". He proposed retaining the paragraph as currently worded.

Mr. Saboia said that, as a matter of principle, he agreed with the proposal made by Mr. Park.

The Chair said that there appeared to be a feeling that the Commission should not pursue Mr. Park's suggestion.

Paragraph (9) was adopted.

Paragraph (10)

Ms. Lehto (Special Rapporteur) proposed the replacement of the word "those" with the word "persons".

Paragraph (10), as amended, was adopted.

Paragraph (11)

Mr. Rajput said that he was unsure about the utility of the paragraph in the context of environmental protection. If there were some kind of connection, direct or otherwise, he would have hoped to see at least a reference to relevant treaty provisions. In his view, the paragraph could be deleted since the purpose of the commentary was not to list all international humanitarian law obligations.

Ms. Lehto (Special Rapporteur) said that there was a connection to the topic as a whole. The reference to explosive remnants of war was linked to draft principle 16.

Sir Michael Wood said that, since footnote 14 did not refer to explosive remnants of war, he proposed the deletion of the words "and explosive remnants of war" from paragraph (11), leaving the discussion on that subject to draft principle 16.

Ms. Lehto (Special Rapporteur) said that she agreed that landmines were different from explosive remnants of war. Although it could be argued that the latter were relevant to draft principle 4, she did not insist on keeping that reference.

Paragraph (11), as amended, was adopted.

Paragraph (12)

Paragraph (12) was adopted.

Paragraph (13)

Ms. Lehto (Special Rapporteur) said that footnote 17 should be amended to include Switzerland in the list of States to which it referred.

Paragraph (13), with an amendment to footnote 17, was adopted.

Paragraph (14)

Paragraph (14) was adopted.

The commentary to draft principle 4 as a whole, as amended, was adopted.

Commentary to draft principle 6 (Protection of the environment of indigenous peoples)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Sir Michael Wood proposed that, in the last sentence of footnote 26, the words "of the application of" should be inserted before the words "rights of indigenous peoples".

Paragraph (2), with an amendment to footnote 26, was adopted.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were adopted.

Paragraph (5)

Paragraph (5) was adopted.

Paragraph (6)

Mr. Petrič said that he would welcome an explanation from the Special Rapporteur of how military activities could be justified by a "relevant public interest".

Mr. Park said that the phrase in question had been taken from the United Nations Declaration on the Rights of Indigenous Peoples. The quotation from article 30, paragraph 1, of the Declaration was, however, incomplete. The end of the first sentence should therefore be supplemented with the phrase "and other relevant reasons", followed by a reference to a footnote 30, with the result that the current footnote 30 would become footnote 31 worded "*ibid.*".

Mr. Rajput said that paragraph (6) correctly reflected the action that should be taken and was in keeping with article 30, paragraph 1, of the above-mentioned Declaration. Any doubts about the disputed phrase might be dispelled by placing it in quotation marks to highlight the fact that it was drawn from the Declaration.

Sir Michael Wood, supported by **Mr. Saboia**, **Ms. Oral** and **Mr. Jalloh**, proposed that, in the first sentence, the phrase "or otherwise freely agreed with, or requested by, the indigenous people concerned" should be inserted after "relevant public interest".

Paragraph (6) was adopted, as amended by Sir Michael Wood and with the addition of the footnote proposed by Mr. Park.

Paragraphs (7) to (9)

Paragraphs (7) to (9) were adopted.

The commentary to draft principle 6 as a whole, as amended, was adopted.

Commentary to draft principle 7(Agreements concerning the presence of military forces in relation to armed conflict)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Mr. Park proposed the insertion of the acronym SOFA in brackets at the end of the second sentence.

Mr. Murase said that the final sentence of paragraph (1) contradicted paragraphs (2) to (4), because a status of forces agreement had nothing to do with an armed conflict.

Sir Michael Wood said that, if Mr. Park's suggestion to add the acronym were accepted, it might be more accurate to refer to SOFAs and SOMAs. Mr. Murase was right to a degree but, on the other hand, some status of forces agreements could be directly related to an armed conflict, as had been the case in Iraq. Some of the agreements referred to in the footnotes might require review on second reading.

Ms. Lehto (Special Rapporteur) said that the Drafting Committee had considered that the draft principle could cover both SOFAs and SOMAs. She had already checked the footnotes and had ascertained that all the agreements mentioned were appropriate.

Paragraph (2) was adopted with minor editorial additions.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

Mr. Park said that he wondered whether the memorandum of special understanding between the United States and the Republic of Korea could really be termed an agreement with a less clear relation to armed conflict.

Mr. Rajput, supported by **Sir Michael Wood**, said that Mr. Park's concern might be addressed by inserting the words "including those" in the first sentence after the reference to the presence of military forces.

Ms. Lehto (Special Rapporteur) said that she could agree to that proposal. All the examples mentioned were relevant, because they concerned the presence of military forces and good practice in relation to environmental protection.

Paragraph (4), as amended, was adopted.

Paragraphs (5) to (7)

Paragraphs (5) to (7) were adopted.

The commentary to draft principle 7 as a whole, as amended, was adopted.

Commentary to draft principle 8 (Peace operations)

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

Paragraph 6

Paragraph (6) was adopted with a minor editorial amendment.

Paragraphs (7) to (9)

Paragraphs (7) to (9) were adopted.

The commentary to draft principle 8 as a whole, as amended, was adopted.

Commentary to draft principle 14 (Peace process)

Paragraphs (1) to (9)

Paragraphs (1) to (9) were adopted.

The commentary to draft principle 14, as a whole, was adopted.

Commentary to draft principle 15 (Post-armed conflict environmental assessments and remedial measures)

Paragraphs (1) to (6)

Paragraphs (1) to (6) were adopted.

The commentary to draft principle 15, as a whole, was adopted.

Commentary to draft principle 16 (Remnants of war)

Paragraph (1)

Ms. Lehto (Special Rapporteur) proposed the insertion of the word "causing" in the second sentence so that it would read "… hazardous remnants of war that are causing or that may cause damage to the environment …".

Paragraph (1), as amended, was adopted.

Paragraphs (2) to (9)

Paragraphs (2) to (9) were adopted.

The commentary to draft principle 16 as a whole, as amended, was adopted.

Commentary to draft principle 17 (Remnants of war at sea)

Paragraphs (1) to (7)

Paragraphs (1) to (7) were adopted.

The commentary to draft principle 17, as a whole, was adopted.

Commentary to draft principle 18 (Sharing and granting access to information)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

Sir Michael Wood said that paragraphs (3), (4) and (5) provided for some very extensive obligations in regard to the sharing of and access to information. As the information in question concerned sensitive, military information, those three paragraphs should either be deleted, or, alternatively, it should at least be made clear that access to such information was subject to the national security considerations of the State or international organization concerned. There was an allusion to that requirement in other paragraphs, but it might be wise to add a new, more explicit paragraph on the subject. In the absence of such a provision, the commentary would make the draft principle rather unrealistic and would not find much traction with States and their military forces.

Mr. Jalloh said that he was opposed to the deletion of the paragraph and would be grateful to hear Sir Michael Wood's proposal for an additional clarifying paragraph.

Mr. Saboia said that paragraph 2 of the draft principle already contained a safeguard which protected the right of a State or international organization to restrict access to sensitive information. Perhaps the Special Rapporteur could propose a way of ensuring consistency between the subject matter of paragraph (3) and the contents of paragraph 2 of the draft principle.

Ms. Oral said that she agreed with Mr. Saboia. National legislation and international instruments, such as the Aarhus Convention, did provide for exceptions to the sharing of or granting access to environmental information with implications for national security or defence. Paragraph 2 of the draft principle should allay Sir Michael Wood's concern.

Sir Michael Wood said that the wording of the draft principle was fine, but the commentaries were unbalanced because they did not mention paragraph 2 for a very long time and then did so in rather unclear terms. One solution might be to insert a paragraph, possibly before paragraph (1) or paragraph (3), to the effect that draft principle 18 consisted of two paragraphs, the second of which made it plain that nothing in the draft principle required the granting of information vital to national defence.

Ms. Lehto (Special Rapporteur), supported by **Mr. Rajput**, said that it could indeed be made clear at the beginning of the commentary that draft principle 18 comprised two paragraphs. She drew attention to paragraph (18) which specifically referred to the exceptions and limitations contained in multilateral environmental conventions, such as the Aarhus Convention. It might therefore be advisable to move paragraph (18) to the beginning of the commentary and to add a paragraph (19) commenting specifically on paragraph 2 with language drawn from the Convention on the Law of the Non-navigational Uses of International Watercourses.

Sir Michael Wood said the Special Rapporteur's suggestion was very helpful. If paragraph (18) were moved to follow paragraph (2), the beginning of the paragraph would have to be altered slightly.

Ms. Escobar Hernández suggested the addition in footnote 135 of a reference to the Escazu Convention on Access to Information, Participation and Access to Justice in order to buttress paragraph 2.

Mr. Jalloh said that he was in favour of moving paragraph (18) to the front of the commentary but additional language would be unnecessary, as paragraph (2) read together with paragraph (18) provided sufficient caveats.

Paragraph (3) was adopted

Paragraphs (4) to (20)

Paragraphs (4) to (20) were adopted.

The commentary to draft principle 17 as a whole, with the relocation of paragraph (18), was adopted.

The portion of Chapter IX contained in document A/CN.4/L.922/Add.1 as a whole, as amended, was adopted.

Chapter IX of the draft report as a whole, as amended, was adopted.

Chapter X. Succession of States in respect of State responsibility

The Chair invited the Commission to consider chapter X of the draft report, contained in document A/CN.4/L.923.

A. Introduction

Paragraph 1

Paragraph 1 was adopted.

Paragraph 2

Mr. Jalloh, referring to the phrase "would be left pending", said he wished to propose that the Secretariat should find a formulation to replace that phrase with language consistent with that used in the context of the topics of peremptory norms of international law (*jus cogens*) and identification of customary international law.

On that understanding, paragraph 2 was adopted.

B. Consideration of the topic at the present session

Paragraphs 3 to 6

Paragraphs 3 to 6 were adopted.

Mr. Šturma (Special Rapporteur) proposed the insertion of an additional paragraph after paragraph 6 which would reflect the proposal made by some members of the Commission during the debate in plenary session. That paragraph would read: "At its 3451st meeting, held on 9 August 2018, the Commission decided to request from the Secretariat a memorandum providing information on treaties which might be of relevance to its future work on the present topic."

Mr. Nolte said that, if such a study were to be requested, reference to it should be made in chapter XIII of the Commission's draft report, which dealt *inter alia* with other decisions of the Commission.

The Chair said that it might suffice to include the request to the Secretariat only in chapter XIII. According to the Secretariat, practice in that regard was inconsistent. If the text of the new paragraph proposed by the Special Rapporteur was acceptable to the Commission, it could be adopted on the understanding that its placement within the draft report would be finalized later. He took it that the Commission agreed to that suggestion.

It was so decided.

1. Introduction by the Special Rapporteur of the second report

Paragraphs 7 to 14

Paragraphs 7 to 14 were adopted.

2. Summary of the debate

(a) General comments

Paragraphs 15 and 16

Paragraphs 15 and 16 were adopted.

Paragraph 17

Mr. Nolte said that, in the fourth sentence of paragraph 17, the words "if not *de lege ferenda*" suggested a view of the relationship between progressive development and *lex ferenda* that he did not share. He suggested that "if not" should be changed to "or".

Mr. Šturma (Special Rapporteur) said that he agreed to that suggestion; he held similar views to Mr. Nolte on the underlying issue.

Paragraph 17, as amended, was adopted.

Paragraphs 18 to 20

Paragraphs 18 to 20 were adopted.

(b) Specific comments

(i) Draft article 5 — Cases of succession of States covered by the present draft articles

Paragraph 21

Paragraph 21 was adopted.

(ii) Draft article 6 — General rule

Paragraphs 22 to 24

Paragraphs 22 to 24 were adopted.

(iii) Draft article 7 — Separation of parts of a State (secession)

Mr. Šturma (Special Rapporteur) suggested that the word "secession" and its parentheses should be deleted from the heading in line with the substance of the Commission's discussions, as reflected in paragraph 25.

The Chair said he took it that the Commission agreed to that suggestion.

It was so decided.

Paragraph 25

Sir Michael Wood proposed that, in the first sentence, the word "expunge" should be replaced with "omit".

Paragraph 25, as amended, was adopted.

Paragraph 26

Paragraph 26 was adopted.

(iv) Draft article 8 — Newly independent States

Paragraphs 27 and 28

Paragraphs 27 and 28 were adopted.

(v) Draft article 9 — Transfer of part of the territory of a State

Paragraph 29

Paragraph 29 was adopted.

(vi) Draft article 10 — Uniting of States

Paragraphs 30 and 31

Paragraphs 30 and 31 were adopted.

(vii) Draft article 11 — Dissolution of State

Paragraphs 32 and 33

Paragraphs 32 and 33 were adopted.

(c) Final form

Paragraph 34

Paragraph 34 was adopted.

(d) Future programme of work

Paragraph 35

Paragraph 35 was adopted.

3. Concluding remarks of the Special Rapporteur

Paragraphs 36 to 44

Paragraphs 36 to 44 were adopted.

Paragraph 45

Sir Michael Wood proposed that, in the first sentence, the word "expunging" should be replaced with "omitting".

Paragraph 45, as amended, was adopted.

Paragraphs 46 and 47

Paragraphs 46 and 47 were adopted.

Chapter X of the draft report as a whole, as amended, was adopted.

Chapter XIII. Other decisions and conclusions of the Commission (A/CN.4/L.913)

The Chair invited the Commission to consider chapter XIII of its draft report, contained in document A/CN.4/L.913.

A. General principles of law

Paragraph 1

Paragraph 1 was adopted.

B. Requests by the Commission for the Secretariat to prepare and update studies on topics in the Commission's agenda

Paragraph 2

The Chair said that the first sentence of paragraph 2 would be completed by the Secretariat after the session.

On that understanding, paragraph 2 was adopted.

The Chair suggested that the new paragraph proposed earlier in the meeting by Mr. Šturma — the text of which had already been agreed — should be placed immediately after paragraph 2, as it concerned a request to the Secretariat to provide a memorandum under a topic on the Commission's agenda.

It was so decided.

C. Programme, procedures and working methods of the Commission and its documentation

The Chair said that, in order to streamline the Commission's work, the Planning Group would not present a separate report on its work during the adoption of the Commission's report on the work of its seventieth session. Accordingly, it should be borne in mind that any paragraphs in section C of chapter XIII that referred to specific decisions were being considered for adoption for the first time.

Paragraphs 3 and 4

Paragraphs 3 and 4 were adopted.

1. Working Group on the long-term programme of work

Paragraphs 5 to 7

Paragraphs 5 to 7 were adopted.

2. Working Group on methods of work of the Commission

Paragraph 8

Paragraph 8 was adopted.

3. Consideration of General Assembly resolution 72/119 of 7 December 2017 on the rule of law at the national and international levels

Paragraphs 9 to 17

Paragraphs 9 to 17 were adopted.

4. Consideration of paragraphs 13 and 14 of resolution 72/116 of 7 December 2017 on the report of the International Law Commission on the work of the sixty-ninth session

Paragraph 18

Mr. Nolte said that, in the last sentence, the word "easy" was superfluous. He proposed that, for the sake of clarity, the sentence should end after the words "representatives of Governments".

The Chair suggested instead that the words "representatives of Governments, and particularly representatives of the Sixth Committee" could be altered to "representatives of Governments in the Sixth Committee".

Mr. Nolte said the Commission had also interacted with representatives of Governments not represented in the Sixth Committee.

The Chair recalled that there had likewise been interaction with representatives of academia and other sectors.

Sir Michael Wood, supported by **Ms. Oral**, said that the reference to the Sixth Committee should be retained, as it was the Commission's principal sphere of interaction at United Nations Headquarters. He proposed that the end of the last sentence should be reworded to read: "representatives of Governments, and particularly those in the Sixth Committee".

Mr. Rajput said that the words "and others" could be added to encompass representatives of bodies such as non-governmental organizations.

Mr. Jalloh said that he supported the retention of the reference to the Sixth Committee and welcomed Mr. Rajput's proposed addition.

Mr. Rajput proposed that the end of the sentence should read "representatives of Governments, especially in the Sixth Committee, and others".

The Chair said that chapter XII of the Commission's draft report covered interaction with non-governmental representatives in detail. Nonetheless, he took it that the Commission agreed to amend paragraph 18 as last proposed by Mr. Rajput.

Paragraph 18, as amended, was adopted.

5. Honoraria

Paragraph 19

Paragraph 19 was adopted.

6. Documentation and publications

Paragraph 20

Mr. Rajput suggested that, in the first sentence, the words "underscored once more" should be changed to "reiterated".

Mr. Nolte pointed out that the verb "reiterated" already appeared in the second sentence.

Sir Michael Wood, supported by **Mr. Ruda Santolaria**, said that he preferred to retain the word "underscored", which conveyed a greater sense of emphasis. The paragraph covered an issue of great importance for the Commission's future work.

Paragraph 20 was adopted.

Paragraphs 21 to 26

Paragraphs 21 to 26 were adopted.

7. Yearbook of the International Law Commission

Paragraphs 27 and 28

Paragraphs 27 and 28 were adopted.

8. Assistance of the Codification Division

Paragraph 29

Paragraph 29 was adopted.

9. Websites

Paragraph 30

Paragraph 30 was adopted.

10. United Nations Audiovisual Library of International Law

Paragraph 31

Paragraph 31 was adopted.

D. Date and place of the seventy-first session of the Commission

Paragraph 32

The Chair, pointing out that an 11-week session had been proposed for 2019, said that, in line with his earlier explanation, by adopting paragraph 32 the Commission would be deciding to accept that proposal.

Mr. Nolte said that it was his understanding the idea had been raised of including a reference to the Commission's seeking to shorten the 2019 session if possible. He wondered whether that idea would be reflected in some form.

The Chair said that it had been agreed that he would include such a reference in his written reply to the United Nations Legal Counsel but that no mention of it would be made in the Commission's report to the General Assembly.

On that understanding, paragraph 32 was adopted.

E. Cooperation with other bodies

Paragraphs 33 and 34

Paragraphs 33 and 34 were adopted.

The Chair drew attention to a new paragraph proposed by the Secretariat for inclusion between existing paragraphs 34 and 35 which read:

> "In accordance with article 26, paragraph 1, of its Statute, the Commission recommended that a meeting be held during the second part of its seventy-first session with the African Union Commission on International Law (AUCIL) as part of the activities to commemorate the tenth anniversary of AUCIL. The Commission requests the Secretariat, in consultation with the Chair of the Commission and members of the Enlarged Bureau, to commence making arrangements for the holding of such a meeting."

He suggested that reference should also be made to the fact that such a meeting was being contemplated at the formal request of AUCIL. The text reflected the Enlarged Bureau's recommendation to respond positively to that request.

Mr. Nolte suggested that the word "initiative" should be used rather than "request".

Sir Michael Wood asked whether any further details were available regarding the arrangements envisaged.

The Chair replied that there had not yet been time to consider in depth the detailed request made by AUCIL. Care should be taken to avoid prejudging the outcome of discussions between the Secretariat and AUCIL.

Sir Michael Wood suggested that the meeting could take the form of a visit to the Commission, similar to those that had taken place during the present session involving representatives of the Inter-American Juridical Committee and the Committee of Legal Advisers on Public International Law of the Council of Europe, but with all members of AUCIL present. Such a meeting could serve as a joint meeting of AUCIL and the Commission.

The Chair, while acknowledging that possibility, said that the concept of a joint meeting could have implications that would reach further than envisaged. The text proposed by the Secretariat was prudent and left room for negotiation.

Mr. Nolte suggested that the words "to commence" should be changed to "to explore", which would leave the outcome open.

Mr. Rajput asked whether the proposed text could be circulated in writing to facilitate the Commission's discussion. The request and how to respond to it raised many questions.

The Chair suggested that, although the Enlarged Bureau had recommended a positive response to the AUCIL request, the text for inclusion in the report need only refer to the matter in generally positive terms; details could be finalized later.

Mr. Jalloh said that he supported that suggestion.

Mr. Ouazzani Chahdi said that it was important to set a clear agenda for the meeting in advance.

The Chair further suggested that, as with the commemorative events for the Commission's seventieth anniversary, a small group, including the members of the Commission from States of the African Group, could be constituted to discuss the request from AUCIL in detail. Such a group could work during the inter-sessional period. His suggestion could be discussed at the Commission's next meeting; in the meantime, he took it that the Commission agreed to request the Secretariat to circulate the text of the proposed paragraph, translated into all official languages and incorporating the amendments already suggested, for discussion the following day.

It was so decided.

The meeting rose at 6.05 p.m.

Provisional

For participants only

18 October 2018

Original: English

International Law Commission
Seventieth session (second part)

Provisional summary record of the 3452nd meeting
Held at the Palais des Nations, Geneva, on Friday, 10 August 2018, at 10 a.m.

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Corrections to this record should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent *within two weeks of the date of the present document* to the English Translation Section, room E.6040, Palais des Nations, Geneva (trad_sec_eng@un.org).

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Present:

Chair:	Mr. Valencia-Ospina
Members:	Mr. Argüello Gómez
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Hassouna
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Mr. Wako
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10.10 a.m.

Draft report of the Commission on the work of its seventieth session (*continued*)

Chapter XIII. Other decisions and conclusions of the Commission (*continued*) (A/CN.4/L.913)

The Chair, recalling that at the previous meeting it had been decided that the Secretariat should revise, in the light of suggestions made, the text of a new proposed paragraph for insertion between existing paragraphs 34 and 35, said that the proposed revised version read:

> "In response to an initiative by the African Union Commission on International Law (AUCIL), and in accordance with article 26 (1) of its statute, the Commission recommended that a meeting be held during the second part of its seventy-first session with AUCIL in the context of activities to commemorate the tenth anniversary of AUCIL. The Commission requests the Secretariat, in consultation with the Chair of the Commission and members of the Enlarged Bureau, to explore arrangements for the holding of such a meeting."

Mr. Rajput asked whether the preparations for the meeting would involve Commission members from all of the regional groups.

Mr. Nolte, supported by **Mr. Rajput**, said that, in the second sentence of the proposed new paragraph, the word "arrangements" should perhaps be replaced with "possibilities", since it had not yet been confirmed that such a meeting would in fact be held.

Mr. Jalloh said that using the word "possibilities" would dilute the language of the paragraph.

Mr. Huang said that he associated himself with the remarks made by Mr. Rajput and Mr. Nolte. While he welcomed the initiative, he wished to emphasize the fact that no such meeting had previously been held in the 70 years of the existence of the Commission. Before setting a precedent in that regard, the Commission must consider very carefully the implications of any such decision, which might open the door to similar requests from other bodies.

Mr. Nolte said that Mr. Huang's concern was met by the fact that the text clearly stated that the proposed meeting was intended to mark the occasion of the tenth anniversary of AUCIL and would not therefore set a precedent for regular engagement with such bodies. The use of the word "possibilities" instead of "arrangements" would make clear that the Commission was exploring whether, rather than how, to hold a meeting and that it had not yet committed itself unconditionally in that regard.

The Chair said that the text that had been drafted by the Secretariat simply welcomed the initiative without necessarily committing the Commission to anything beyond that. While the communication from AUCIL had used the term "joint meeting", the proposed paragraph spoke only of a "meeting", which might consist of a meeting of the Commission attended by AUCIL members as observers or something more formal. Such details could be fleshed out later; in the document under consideration it was necessary only to inform the General Assembly that the Commission welcomed the initiative.

He took it that the Commission wished to adopt the paragraph as amended by Mr. Nolte.

It was so decided.

The Chair, recalling that at the previous meeting he had suggested the formation of a small group to begin examining the question in detail, said that he wished to propose that the group should consist of, in addition to the Chair and the members of the Enlarged Bureau, as indicated in the adopted paragraph, all the members of the African Group and a representative of each of the other regional groups. He wished to propose Mr. Šturma from the Eastern European Group, Mr. Rajput from the Asia-Pacific Group, Mr. Ruda Santolaria

from the Group of Countries of Latin America and the Caribbean and Ms. Galvão Teles from the Group of Western European and other States.

Mr. Rajput said that he would prefer that the Asia-Pacific Group should elect its own representative.

It was so decided.

Paragraph 35

Paragraph 35 was adopted.

F. Representation at the seventy-third session of the General Assembly

Paragraph 36

Paragraph 36 was adopted.

G. International Law Seminar

Paragraphs 37 to 48

Paragraphs 37 to 48 were adopted.

Paragraph 49

Mr. Murase asked whether the reference to the General Assembly, at the end of the fourth sentence of paragraph 49, was correct.

The Chair said that "General Assembly" should be replaced with "Seminar".

Paragraph 49, as amended, was adopted.

Chapter XIII of the draft report as a whole, as amended, was adopted.

Chapter XI. Immunity of State officials from foreign criminal jurisdiction (A/CN.4/L.924)

The Chair invited the Commission to consider chapter XI of its draft report, as contained in document A/CN.4/L.924. He said that the chapter did not contain a summing-up by the Special Rapporteur since the debate on the topic of "Immunity of State officials from foreign criminal jurisdiction" was expected to continue at the Commission's seventy-first session.

Paragraphs 1 to 3

Paragraphs 1 to 3 were adopted.

Paragraph 4

Sir Michael Wood said that he wished to place on record that the meaning of the term "the kinds of acts affected", which appeared in the third sentence of paragraph 4 and elsewhere in the document in reference to the acts affected by immunity, was unclear in English. While he did not wish to propose any textual changes to the document under consideration, the Commission should, when it came to formulate draft articles, give very careful consideration to that expression.

Mr. Nolte said that he agreed with Sir Michael Wood's comment. In the second sentence, "the procedural aspects" should be amended to read "procedural aspects".

Ms. Escobar Hernández (Special Rapporteur) said that she would take Sir Michael Wood's observation into account, in particular when presenting the draft articles. With regard to the proposal made by Mr. Nolte, the relevant chapters of her sixth report addressed the question of procedural aspects in general and from a methodological perspective. As such, an alternative solution could be to amend the beginning of the second sentence to read "She then started to address the procedural aspects".

Paragraph 4 was adopted with that amendment.

Paragraph 5

Paragraph 5 was adopted.

Paragraph 6

Mr. Park proposed the insertion between the first and second sentences of two new sentences, which were modelled on language contained in paragraph 193 of the Commission's report on its sixty-eighth session (A/71/10). The sentences would read: "At the time of its consideration, the report had only been available in the other five official languages of the United Nations for three days. Accordingly, the debate in the Commission was of a preliminary nature."

The Chair said that, in his view, it was not necessary or appropriate to include such language, since it would seem to be an implied criticism of the Commission, the Special Rapporteur and the conference management and translation services, when in fact great efforts had been made to issue the translations in a timely manner. While he would not object to a reference to the preliminary nature of the debate, it was not necessary to explain the reasons for it.

Mr. Nolte said that the description of the situation was less transparent than that provided in the Commission's report on its sixty-eighth session regarding a similar situation.

The Chair said that it was necessary only to refer to the preliminary nature of the debate and the fact that it would continue in the seventy-first session. The Sixth Committee would be able to draw the correct conclusions from that information.

Mr. Saboia said that he supported the Chair's position.

Mr. Ruda Santolaria said the current text was sufficient. Paragraph 27 highlighted the fact there had been limited time available for the debate at the current session and that consequently members who had spoken had stressed the preliminary character of their interventions.

Mr. Tladi said that it had been his intention to raise the same point as Mr. Ruda Santolaria.

Mr. Rajput said that the most important thing was to convey to the Sixth Committee that the Commission had not taken a definitive position on the topic. It could be sufficient to insert the words "was of a preliminary nature and" before "would be continued" in the second sentence of paragraph 6.

Mr. Park said that his proposal was intended to be a neutral reflection of the facts, without assigning blame. Paragraph 27 did not specify the reasons why the time available had been limited; it was necessary to reflect those reasons somewhere in the text.

The Chair said that including such information would mean treating the topic of immunity of State officials from foreign criminal jurisdiction differently from other topics, since nowhere in the report had the Commission stated that a lack of time had prevented the Drafting Committee from completing its work on three topics.

Mr. Jalloh said that he wished to associate himself with the comments of Mr. Saboia, Mr. Ruda Santolaria, Mr. Tladi and the Chair. In his view, paragraph 6 clearly explained what had happened at the session, particularly when read with paragraph 27. Since the Commission had striven to harmonize its treatment of topics, it would be unfortunate to introduce an inconsistency for one particular topic. If Mr. Park insisted on his proposal, he could live with the insertion of the word "preliminary" before "debate" in the second sentence.

Mr. Ruda Santolaria said that paragraph 27 clearly stated that the members who had spoken on the topic had reserved the right to comment further. An alternative solution might be to insert the words "in a preliminary manner" after "sixth report" in the first sentence of paragraph 6.

Mr. Murase said that, since paragraph 28 made reference to the fact that some members had regretted the late issuance of the Special Rapporteur's report, there was no need to refer to the issue in paragraph 6.

Mr. Petrič, supported by **Ms. Oral**, said that describing the debate as "preliminary" would be sufficient to reflect the factual reality of the situation.

Ms. Lehto said that she did not see the need for the word "preliminary" but that she could accept it as a compromise solution.

Mr. Cissé supported by **Mr. Vázquez-Bermúdez**, said that the addition in paragraph 6 of the word "preliminary" was unnecessary since it already appeared in paragraph 27.

Ms. Escobar Hernández (Special Rapporteur) said that, in her view, there was no need to modify the paragraph, which accurately reflected the status of the debate. In any event, it was not the debate that had been preliminary, but the interventions made by members, a point that was already conveyed in paragraph 27 of the document. The situation at the current session was not comparable to the one in which the Commission had found itself in 2016, when her fifth report (A/CN.4/701) had not been available to members in all the official languages of the United Nations. As noted by Mr. Murase, the fact that some members had expressed regret at the late issuance of her sixth report was captured in paragraph 28. In addition, the Commission's intention to continue and complete the debate on the report at its seventy-first session was stated in paragraphs 6, 27, 28 and 64.

The Chair said that the status of the debate could not have been more clearly specified, as explained by the Special Rapporteur.

Paragraph 6 was adopted.

1. Introduction by the Special Rapporteur of the sixth report

Paragraph 7

Ms. Escobar Hernández (Special Rapporteur) said that, in the light of comments submitted to her by some members, the final clause of the last sentence should be redrafted to read: "the consideration of which for some members of the Commission was a condition for the adoption of draft article 7".

Paragraph 7, as amended, was adopted.

Paragraphs 8 and 9

Paragraphs 8 and 9 were adopted.

Paragraph 10

Sir Michael Wood said that, in the first sentence, the word "against" should be replaced with "in".

Paragraph 10, as amended, was adopted.

Paragraphs 11 to 13

Paragraphs 11 to 13 were adopted.

Paragraph 14

Sir Michael Wood proposed the addition of the word "foreign" before "State officials".

Paragraph 14, as amended, was adopted.

Paragraphs 15 to 26

Paragraphs 15 to 26 were adopted.

2. Summary of the debate

Paragraph 27

Mr. Huang said that the concern voiced by Mr. Park in relation to paragraph 6 was reasonable and should be addressed somewhere. It was not true, as claimed in the first sentence, that there had been "limited time available to the Commission at the present session". The issue had been the scant time allocated to the consideration of the topic owing to the delayed issuance of the report. The first sentence should be amended accordingly.

The Chair said that it was not necessarily the allocation of time that had been problematic. After all, time was allocated on the basis of how much was available. The words "to the Commission" should be replaced with "for the consideration of the report", or words to that effect.

Paragraph 27 was adopted on that understanding.

(a) General comments

Paragraph 28

Paragraph 28 was adopted.

Paragraph 29

Mr. Nolte proposed that, in the third sentence, the word "to" should be inserted before "harmonize". In the last sentence, the word "nevertheless" could be deleted, since the last two sentences, which it appeared to connect, did not stand in contradiction or opposition to each other.

Ms. Escobar Hernández (Special Rapporteur) said that there was no equivalent of the word "nevertheless" in the Spanish text. She was happy to accept Mr. Nolte's proposals concerning the English text.

Paragraph 29, as amended, was adopted.

Paragraph 30

Mr. Nolte said that a new sentence should be inserted at the end of the paragraph to reflect an observation made by Mr. Murphy during the session. The sentence might read: "Other members pointed to the fact that rules of a treaty, for example article 27 of the Rome Statute, did not apply to States that are not parties to the Statute." As he could not recall Mr. Murphy's exact words, his proposal was subject to verification by the Secretariat.

The Chair said that, if Mr. Murphy had been alone in making that observation, the Commission should use the phrase "The view was also expressed that", or something along those lines.

Paragraph 30 was adopted on that understanding.

Paragraph 31

Sir Michael Wood said that, for the sake of clarity, the words "for some members" should be moved to the very beginning of the third sentence.

Paragraph 31, as amended, was adopted.

Paragraph 32

Paragraph 32 was adopted.

(b) Comments on the summary of the debate on draft article 7

Paragraph 33

Mr. Tladi proposed the insertion of a new second sentence to capture a comment that he had made in the plenary debate. The sentence would read: "Some members noted that the majority of States in the Sixth Committee supported draft article 7 as adopted by the Commission."

Sir Michael Wood said that, in the third sentence, the words "their preference" should be replaced with "the importance". He found the sentence proposed by Mr. Tladi very misleading indeed. The statement reflected therein was obviously wrong. Although it might have been made by one member, other members had expressed different views about what had happened in the Sixth Committee. He therefore hoped that Mr. Tladi would not insist on the inclusion of the sentence.

Mr. Nolte said that he was surprised by Mr. Tladi's proposal, which he also found misleading. If Mr. Tladi insisted on its incorporation, he would request that the Commission's consideration of the paragraph should be suspended until he had drafted a sentence to capture his own comments and those of Mr. Murphy, who had drawn a distinction between States that had expressed sympathy for draft article 7 and those that had made clear their dislike of it. While a slight majority of States might have expressed sympathy for the provision, the others had also criticized certain elements thereof.

Mr. Tladi said that he had been consistent about the importance of being faithful to what had transpired during the Commission's discussions in plenary. To reflect the balance of the debate and the points raised by Sir Michael Wood and Mr. Nolte, the following sentence could be inserted after the new sentence that he had proposed: "Some members noted that many States criticized various aspects of draft article 7."

Mr. Huang said that he would prefer not to change the paragraph, which already struck the right balance. If Mr. Tladi's proposal were accepted, it should be made clear in the paragraph that other members of the Commission had deemed his statement in plenary untrue. After all, of the 46 States that had given an opinion on draft article 7 in the Sixth Committee, 26 had expressed concern and some degree of dissatisfaction.

The Chair said that the purpose of the paragraph was to summarize not the debate that had taken place in the Sixth Committee, but the Commission's own discussions in plenary. Members were entitled to interpret the debate in the Sixth Committee in a particular way, and other members had the right to disagree.

Mr. Petrič said that the phrase "The view was also expressed that" could be used in the search for a compromise.

Paragraph 33 was left in abeyance.

(c) Comments on the procedural aspects dealt with in the sixth report

Paragraphs 34 to 36 were adopted.

Timing

Paragraphs 37 to 42

Paragraphs 37 to 42 were adopted.

Acts affected

Paragraphs 43 to 48

Paragraphs 43 to 48 were adopted.

Determination of immunity

Paragraph 49

Paragraph 49 was adopted.

Paragraph 50

Mr. Tladi proposed that, in the first sentence, the words "executive actions" should be replaced with "the executive".

Paragraph 50, as amended, was adopted.

Paragraphs 51 to 54

Paragraphs 51 to 54 were adopted.

(d) Comments on procedural safeguards and guarantees

Paragraphs 55 to 58

Paragraphs 55 to 58 were adopted.

Paragraph 59

Mr. Zagaynov said that a new sentence should be included at the end of the paragraph to reflect a statement that he had delivered in plenary. The sentence would read: "The view was also expressed that it would be hardly possible to solve the questions arising from draft article 7 through procedural safeguards and guarantees."

Paragraph 59, as amended, was adopted.

(e) Future work

Paragraph 60

Mr. Nolte said that not all members who had spoken had expressed the wish to complete the first reading of the draft articles during the Commission's seventy-first session. Consequently, the words "They expressed the wish" at the beginning of the second sentence should be replaced with "The wish was expressed".

Paragraph 60, as amended, was adopted.

Paragraph 61

Mr. Zagaynov said that, in the first sentence, the words "the agreed scope and" should be inserted after "incompatible with". In the last sentence, the word "also" should be used in place of "nevertheless".

Paragraph 61, as amended, was adopted.

Paragraph 62

Paragraph 62 was adopted.

Paragraph 63

Sir Michael Wood said that the paragraph was not at all clear and should be explained by the member or members concerned or deleted.

Ms. Escobar Hernández (Special Rapporteur) said that she would prefer to retain the paragraph, subject to verification by the Secretariat of the relevant statements.

The Chair said that he took it that the Commission agreed to adopt the paragraph on the understanding that the Secretariat would clarify it on the basis of the statements made.

It was so decided.

Paragraph 64

Paragraph 64 was adopted.

The Chair invited the Commission to resume its consideration of the paragraph that had been left in abeyance.

Paragraph 33

Mr. Nolte said that, if the sentence proposed by Mr. Tladi was included, it should be followed by a sentence that read: "Other members did not agree with this assessment and described the debate in the Sixth Committee as States being split practically evenly among themselves, and as evidencing different views about different aspects of draft article 7."

Mr. Huang said that he saw no need for the proposed additional sentences, which merely exposed the differences that existed within the Commission. Besides, Mr. Tladi's claim that the majority of States in the Sixth Committee had supported draft article 7 was inaccurate.

The Chair said that, while he understood the institutional concern voiced by Mr. Huang, the Commission's vibrancy lay precisely in the fact that its members thought differently and expressed their views freely.

Mr. Jalloh, supported by **Mr. Cissé**, said that he agreed with Mr. Huang. Bearing in mind the sensitivity of the topic and what the Commission was trying to accomplish, it would be advisable for the Commission not to focus on areas of difference of view; rather, it should focus on the many areas of agreement. Moreover, since only 46 States had spoken on draft article 7 in the Sixth Committee, it was difficult to draw conclusions about the views of States as a whole, given that there were a total of 193 Member States in the United Nations family.

Mr. Tladi said that he would defer to the wishes of the Special Rapporteur.

Ms. Escobar Hernández (Special Rapporteur) said that, although the proposals by Mr. Tladi and Mr. Nolte accurately reflected statements made during the Commission's debate on her sixth report, she would prefer to adopt the paragraph as amended by Sir Michael Wood, with no further changes, unless the Commission as a whole considered necessary the inclusion of those proposals. There was no need to highlight the divergence of opinion that existed with regard to the debate that had taken place in the Sixth Committee. States were already aware of it and could, in any case, consult the relevant summary records or digital recordings if they so wished.

Paragraph 33, as amended, was adopted.

Chapter XI of the draft report as a whole, as amended, was adopted.

Chapter XII. Commemoration of the seventieth anniversary of the Commission (A/CN.4/L.912)

The Chair invited the Commission to consider chapter XII of its draft report as contained in document A/CN.4/L.912.

A. Introduction

Paragraph 1

Paragraph 1 was adopted.

Paragraph 2

Ms. Oral said that, in the interests of clarity, in footnote 3, the Chair of the Commission and the Chair of the Planning Group should be identified as Mr. Georg Nolte and Mr. Eduardo Valencia-Ospina, respectively.

Paragraph 2, as amended, was adopted.

Paragraph 3

Paragraph 3 was adopted.

B Seventieth anniversary session of the International Law Commission

Paragraphs 4 to 9

Paragraphs 4 to 9 were adopted.

Paragraph 10

Mr. Nolte proposed adding the words "and in the meantime also member of the Commission" after "Mr. Evgeny Zagaynov, Ministry of Foreign Affairs, Russian Federation" to make it clear that, although he had been invited as a panellist in his capacity as a legal adviser, there had been a change in the meantime. That was important in terms of highlighting the balance between Commission members and legal advisers on the panels.

Mr. Zagaynov said that, although it was for the Commission to decide, he had been invited as legal adviser of the Ministry of Foreign Affairs and had specifically pointed out before making his statement during the panel discussion that he was speaking in that capacity.

Mr. Nolte said that it was a sensitive issue and it was important to clarify that the Commission would not have invited Mr. Zagaynov to speak as a legal adviser if he had already been elected as a member at the time of the invitation. It might not be clear to the reader of the report in what capacity Mr. Zagaynov had participated.

The Chair said that, since the paragraph had been drafted skilfully and the panellists who had not spoken as members of the Commission had been identified by their official function, it did not seem necessary to make any further additions.

Paragraph 10 was adopted.

Paragraphs 11 to 15

Paragraphs 11 to 15 were adopted.

Paragraph 16

Mr. Nolte proposed replacing the word "should" before "adapt its working methods to the outcomes of its work" with "needed to further," as the Commission had already begun to adapt its working methods.

Paragraph 16, as amended, was adopted.

Paragraphs 17 to 20

Paragraphs 17 to 20 were adopted.

Paragraph 21

Mr. Peter pointed out that Ms. Gueldich was also a member of the African Union Commission on International Law.

The Chair said that, as she had been invited to speak in her capacity as an academic, the reference to the University of Carthage was sufficient.

Paragraph 21 was adopted.

Paragraph 22

Paragraph 22 was adopted.

Paragraph 23

Mr. Nolte said that, in the paragraph under consideration, Mr. Momtaz was described as a "former member of the Commission," whereas in paragraph 15 Mr. Comissário Afonso was described as the "Permanent Representative of Mozambique in Geneva". For the sake of consistency, perhaps the Secretariat could check Mr. Momtaz's position at the time of the invitation and add a description such as "adviser to the Government of Iran". As the remarks mentioned in the last sentence had been general in nature and not related specifically to that panel, perhaps that sentence should be moved to a separate paragraph, which would become new paragraph 24.

Paragraph 23, as amended, was adopted subject to its completion by the Secretariat.

Paragraphs 24 to 27

Paragraphs 24 to 27 were adopted.

Paragraph 28

Mr. Nolte proposed changing the order of the costs in the second sentence so that the most substantive item — "travel expenses (ticket and per diem) of the keynote speaker in New York and panellists invited to the commemoration in Geneva" — was listed first

Paragraph 28, as amended, was adopted.

Paragraph 29

Mr. Jalloh said that he and other members would be interested to know more about the publication covering the proceedings of the seventieth anniversary commemorative events.

The Chair said that the Secretariat would provide further details in due course.

Paragraph 29 was adopted.

Paragraph 30

Paragraph 30 was adopted.

Chapter XII as a whole, as amended, was adopted.

Chapter I, Introduction (A/CN.4/L.914)

The Chair invited the Commission to consider chapter I of its draft report, which was contained in document A/CN.4/L.914.

Introduction

Paragraph 1

Paragraph 1 was adopted.

A. Membership

Paragraph 2

Paragraph 2 was adopted.

B. Casual vacancy

Paragraph 3

Paragraph 3 was adopted.

C. Officers and the Enlarged Bureau

Paragraphs 4 to 6

Paragraphs 4 to 6 were adopted.

D. Drafting Committee

Paragraphs 7 and 8

Paragraphs 7 and 8 were adopted.

E. Working Groups

Paragraphs 9 to 11

Paragraphs 9 to 11 were adopted.

F. Secretariat

Paragraph 12

Paragraph 12 was adopted.

G. Agenda

Paragraph 13

Paragraph 13 was adopted.

Chapter I of the draft report as a whole was adopted.

Chapter II. Summary of the work of the Commission at its seventieth session (A/CN.4/L.915)

The Chair invited the Commission to consider chapter II of its draft report, which was contained in document A/CN.4/L.915.

Paragraph 1

Paragraph 1 was adopted.

Paragraph 2

Mr. Nolte proposed deleting the words "as a result of its consideration of the topic at the present session" at the beginning of the first sentence, as they were implied, and adding the word "subsequently" between "the Commission" and "adopted on second reading," to bring it into line with paragraph 5.

Sir Michael Wood said that he would have proposed exactly the opposite change in paragraph 5. The formulation "as a result of its consideration of the topic at the present session" was fairly traditional and had been included in previous reports. The word "subsequently" was rather meaningless and he would have proposed deleting it in paragraph 5. However, he agreed that the two paragraphs should have parallel structures.

Mr. Tladi said that he agreed with Mr. Nolte. The Commission had not adopted the set of draft conclusions as a result of its consideration of the topic at the current session but as a result of its consideration over many years.

Sir Michael Wood said that he would accept the deletion of the formulation "a result of its consideration of the topic at the present session" but would rather not include the word "subsequently".

Paragraph 2, as amended, was adopted.

Paragraph 3

Paragraph 3 was adopted.

Paragraph 4

Sir Michael Wood said that the beginning of the sentence should be reordered to read: "The Commission also had before it an updated bibliography on the topic contained in an addendum to that report".

Paragraph 4, as amended, was adopted.

Paragraph 5

The Chair said that, as agreed, the word "subsequently" would be deleted from the first sentence.

Paragraph 5, as amended, was adopted.

Paragraphs 6 to 9

Paragraphs 6 to 9 were adopted.

Paragraph 10

Sir Michael Wood proposed deleting the word "respectively" in the third sentence.

Mr. Nolte said that the word "contained" in the second sentence should be replaced with "proposed".

Paragraph 10, as amended, was adopted.

Paragraphs 11 and 12

Paragraphs 11 and 12 were adopted.

Paragraph 13

Mr. Nolte proposed inserting the word "further" before "analysing" in the first sentence, as the Special Rapporteur had already begun her analysis of procedural aspects.

Paragraph 13, as amended, was adopted.

Paragraph 14

Paragraph 14 was adopted subject to a minor editorial amendment.

Paragraphs 15 to 18

Paragraphs 15 to 18 were adopted.

Chapter II of the draft report as a whole, as amended, was adopted.

Chapter III. Specific issues on which comments would be of particular interest to the Commission (A/CN.4/L.916)

The Chair invited the Commission to consider chapter III of its draft report, which was contained in document A/CN.4/L.916.

Paragraphs 1 and 2

Mr. Nolte said that, as paragraph 2 applied generally to all topics and paragraph 1 specifically to peremptory norms of general international law (*jus cogens*), he would propose inverting the order of the paragraphs. What was currently paragraph 1 would become paragraph 2 and should have its own heading, as was the case for the other topics mentioned in the chapter.

Sir Michael Wood said that he agreed entirely with Mr. Nolte's proposal. The beginning of new paragraph 1 could read: "The Commission would welcome any

information on the following issues". Concerning the deadline for submission of information, in his view 15 January 2019 was very close to the deadline for the submission of reports by Special Rapporteurs. He therefore wondered if an earlier date should be indicated, such as 15 December 2018.

Mr. Nolte said that, in order to allow States sufficient time to prepare their submissions, perhaps the deadline should be 31 December 2018.

Mr. Ouazzani Chahdi said that the date indicated in previous reports had always been 15 January and he did not see any reason to change it.

The Chair said that the Commission's practice in that regard had varied over the years. Bringing the deadline forward to 31 December 2018 would contribute to the timely submission of reports by Special Rapporteurs.

Paragraphs 1 and 2, as amended, were adopted, subject to their completion by the Secretariat.

A. Immunity of State officials from foreign criminal jurisdiction

Paragraph 3

Mr. Nolte said that at the very end of the last sentence the words "of State officials from foreign criminal jurisdiction" should be added after "immunity".

Paragraph 3, as amended, was adopted.

B. Protection of the environment in relation to armed conflicts

Paragraph 4

Paragraph 4 was adopted.

C. Succession of States in respect of State responsibility

Paragraph 5

Paragraph 5 was adopted.

Mr. Jalloh said that paragraph 33 of the report on the work of the Commission's sixty-ninth session (A/72/10) indicated that the Commission would welcome any proposals that States might wish to make concerning possible topics for inclusion in its long-term programme of work. For the sake of consistency, he proposed adding the text of that paragraph as a new section D in the chapter III.

Ms. Galvão Teles (Rapporteur) said that the standing invitation in paragraph 33 of the report on the sixty-ninth session had also been included in previous years.

Sir Michael Wood said that he supported Mr. Jalloh's proposal. He wondered whether the content of paragraph 32 of the report on the sixty-ninth session, which indicated the new topics that had been added to the long-term programme of work at that session and the criteria for the selection of topics, should also be copied *mutatis mutandis* to give context.

Ms. Galvão Teles (Rapporteur) said that the details of the topics added to the long-term programme of work had already been included in chapter XIII on other decisions and conclusions of the Commission and in the summary in chapter II. Perhaps the solution would be to add a paragraph recalling the criteria for the selection of topics and then the paragraph inviting States to submit their proposals.

Ms. Escobar Hernández said that, in terms of structure, the text of paragraph 33 from the previous report should come first, followed by the text of paragraph 32 concerning the criteria but without the reference to the topics added to the long-term programme of work.

Sir Michael Wood said that the logic of the approach adopted for the report on the previous session had been to indicate that new topics had been added to the long-term programme of work and to invite States to submit their views on those topics. That would be lost if the beginning of paragraph 32 were deleted. There had also been duplication of that point in a number of chapters in the previous report.

The Chair said that he took it the Commission wished to use the text of paragraphs 32 and 33 from the report of the sixty-ninth session, with the necessary adjustments in terms of the topics added to the long-term programme of work at the current session, in the same order.

It was so decided.

Chapter III of the draft report as a whole, as amended, was adopted.

The report of the International Law Commission as a whole, as amended, was adopted.

Chair's concluding remarks

The Chair said that the seventieth session had been one of the most productive in the Commission's history. The Commission was submitting to the General Assembly the draft conclusions on identification of customary international law and the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, which had been completed on second reading. It was also submitting to the General Assembly the draft guidelines on provisional application of treaties and the draft guidelines on protection of the atmosphere, which had been completed on first reading. The Commission had also advanced considerably in its work on three other topics, to such an extent that it would not be unreasonable to believe that first readings could be completed at the next session. It was also giving Member States in the Sixth Committee of the General Assembly plenty of material on which to comment in relation to the various other topics that the Commission had considered during the session. The Commission had decided to place the topic of general principles of law on its programme of work and two new topics on its long-term programme of work, namely universal criminal jurisdiction and sea-level rise in relation to international law.

The Commission could be proud of its productivity, its creativity and the continued collegial spirit in which it worked and overcame differences of view. It had successfully concluded the International Law Seminar, to which it attached great importance. He was grateful to his colleagues on the Bureau for their advice and guidance in managing the affairs of the Commission. He thanked the members of the Secretariat from the Codification Division for their competent assistance and continuous support and to the Legal Liaison Office in Geneva for their efficient assistance. He also thanked the précis-writers, interpreters, editors, conference officers, translators and other members of the conference services who had extended their assistance to the Commission on a daily basis.

Closure of the session

After the customary exchange of courtesies, **the Chair** declared the seventieth session closed.

The meeting rose at 1.10 p.m.